

**STATEMENT OF JONATHAN M. WEISGALL ON BEHALF OF
THE PEOPLES OF BIKINI, ENEWETAK, RONGELAP AND UTROK
BEFORE THE HOUSE FOREIGN AFFAIRS SUBCOMMITTEE ON ASIA, THE
PACIFIC AND THE GLOBAL ENVIRONMENT**

May 20, 2010

Mr. Chairman, thank you for giving the peoples of the four atolls of Bikini, Enewetak, Rongelap, and Utrok the opportunity to testify before you today. I have served as legal counsel to the people of Bikini Atoll since 1975, but I am submitting this joint statement on behalf of the four atolls that were most directly affected by the U.S. nuclear testing program in the Marshall Islands.

I. Introduction

The people of the four atolls are here today for one reason: They all trusted the U.S. Government, and they have all suffered as a result. The United States has played a 64-year-old shell game with the constitutional rights of these islanders, who, for their part, have patiently pursued every possible remedy afforded by our legal system – to no avail:

- The U.S. pledged to the United Nations to care for the Marshallese and “protect [them] against the loss of their land and resources.” The U.S. did not fulfill that promise.
- In the 1940’s, the U.S. promised the people of Bikini and Enewetak that they would be accorded the constitutional rights of U.S. citizens. That did not happen.
- The peoples of Bikini and Enewetak did all that the U.S. Government demanded of them and more: They left their home islands for decades and relied on the government’s promise to return them to their property. That has yet to happen.
- When fallout showered the peoples of Rongelap and Utrok, they trusted the U.S. Government to care for them.
- When these events gave rise to compensation claims, the four atolls pursued their claims in U.S. courts, and the U.S. government strongly resisted their claims.
- Then, when the U.S. negotiated the Compact of Free Association with the Marshall Islands, it solemnly “accept[ed] the responsibility for compensation owing to citizens of the Marshall Islands . . . for loss or damage to property and person . . . resulting from the nuclear testing program.”
- However, after acknowledging its obligation to provide compensation, the U.S. forced the Marshallese to seek that compensation not in U.S. courts but rather through a newly-established Nuclear Claims Tribunal in the Marshall Islands.
- The four atolls challenged this scheme, arguing that giving the Tribunal \$45.75 million to cover their claims was woefully inadequate to protect their rights and cutting off federal court review of the adequacy of just compensation was unconstitutional, but the U.S. courts ruled that it was premature to decide

these questions until the Marshallese had exhausted their remedies under the Tribunal.

- So the Marshallese spent the next 19 years litigating their claims before the Tribunal, which did its job and issued more than \$2.2 billion in awards, but, because of limited funding from the United States, was only able to pay out \$3.9 million, which represents less than 2/10 of 1% of its awards.
- The Marshallese trusted the system to make them whole, but the United States paid them virtually nothing on these claims.
- And when the Marshallese came back to the U.S. courts to seek to enforce these awards, the U.S. Government said, "Sorry, the doors of our courts are closed."

In a word, the United States legislated itself out of its obligation to provide just compensation to these islanders, forced their claims into an alternative forum and then failed to provide adequate funds for that forum.

In the meantime, thanks in no small part to the testing program in the Marshall Islands, the United States fought the Soviet Union to a nuclear testing stalemate and eventually won the Cold War, but it has never discharged its fiduciary obligations to the nuclear victims in the Marshall Islands.

II. Background on Nuclear Testing Program in the Marshall Islands

Mr. Chairman, you, more than any other member of Congress, are familiar with this legacy. It began at Bikini in March 1946 when the U.S. Navy moved the 167 islanders off their atoll to facilitate Operation Crossroads, the world's fourth and fifth atomic bomb explosions. The following year, the U.S. Government moved the people of Enewetak off their atoll to start nuclear testing there.

The March 1, 1954 Bravo nuclear test at Bikini was the largest nuclear bomb ever exploded by the United States. Its explosive yield – equal to nearly 1,000 Hiroshima-type atomic bombs – was more than 200 times greater than the yield of the largest test ever conducted at the Nevada Test Site, and its fallout covered an area of 50,000 square miles, with serious-to-lethal radioactivity falling over an area almost equal in size to the entire state of Massachusetts.¹ Radioactive fallout drifted eastward and irradiated the 236 inhabitants of Rongelap and Utrok Atolls, as well as the crew of a Japanese fishing vessel.

The Atomic Energy Commission (AEC) admitted that about 7,000 square miles downwind of the shot "was so contaminated that survival might have depended upon prompt evacuation of the area..."² Put another way, if Bravo had been detonated in

¹ Findings of the Marshall Islands Nationwide Radiological Study Summary Report (December 1994) at p. 3; Jonathan M. Weisgall, Operation Crossroads: The Atomic Tests at Bikini Atoll (Naval Institute Press 1994) at p. 306.

² New York Times, March 25, 1954, pp. 1, 18.

Washington, DC, and the fallout pattern had headed in a northeast direction, it would have killed everyone from Washington to New York, while near-lethal levels of fallout would stretch from New England to the Canadian border.³

The U.S. nuclear weapons testing program had a dramatic impact on the Marshall Islands. Between 1946 and 1958, the United States conducted 67 atomic and hydrogen atmospheric bomb tests at Bikini and Enewetak atolls, with a total yield of 108 megatons. That is the equivalent to 7,200 Hiroshima bombs, which works out to an average of more than 1.6 Hiroshima bombs per day for that 12-year period. During these years, the Marshall Islands were a United Nations Trust Territory administered by the United States, which had pledged to the United Nations to “protect the inhabitants against the loss of their land and resources.”⁴

The U.S. Government moved the people of Bikini five times in four decades, even carelessly back to their own radioactive atoll until the islanders themselves had to sue the United States to be moved off. In March 1946, the government moved the Bikinians to Rongerik Atoll, 125 miles east of Bikini, promising to return them in a few months and to care for them in the interval. Instead, the people nearly starved on Rongerik over the next two years. The United States then moved them to Kwajalein Atoll and then to Kili. Kili remains home to most Bikinians more than 64 years after the testing began, and life there remains difficult. Kili is a single island, not an atoll with a lagoon. Bikini, with its 23 islands and 243-square mile lagoon, is at least 750 times bigger, and its land area is more than nine times bigger. Kili has no sheltered fishing grounds, so the skills the people had developed to fish for lagoon and ocean life were rendered useless on Kili. This drastic change from an atoll existence, with its abundant fish and islands as far as the eye could see, to an isolated island with no lagoon and inaccessible marine resources, continues to take a severe psychological toll on the people.

Following President Lyndon Johnson’s August 1968 announcement that Bikini was safe and that the resettlement of Bikini would “not offer a significant threat to [the Bikinians’] health and safety,” he ordered the atoll rehabilitated and resettled.⁵ Some Bikinians lived there until 1978, when medical tests by U.S. doctors revealed that the people had ingested what may have been the largest amounts of radioactive material of any known population, and they determined that the people had to be moved immediately.⁶ What

³ Jonathan M. Weisgall, Operation Crossroads: The Atomic Tests at Bikini Atoll (Naval Institute Press 1994), pp. 304-05.

⁴ Trusteeship Agreement for the Former Japanese Mandated Islands, 61 Stat. 3301, 80th Cong., 1st Sess. (1947), Art. 6, Sec. 2.

⁵ Shields Warren, “Report of the Ad Hoc Committee To Evaluate The Radiological Hazards Of Resettlement Of The Bikini Atoll,” DOE/CIC Document No. 41847; New York Times, August 13, 1968, p. 1; August 2, 1968 memorandum for the President from Bromley Smith entitled “Return Of The Bikini People,” National Security file, Lyndon B. Johnson Library.

⁶ Washington Post, April 3, 1978, p. 1, and May 22, 1978, p. 1.

went wrong? An AEC blue-ribbon panel, in estimating the radiation dose the people would receive, relied on a scientist's erroneous data that threw off one part of their calculations by a factor of nearly 100. "We just plain goofed," the scientist told the press.⁷

History sadly repeated itself in late August 1978, as U.S. ships once again entered Bikini lagoon and the 139 people living on the island packed up their possessions and left. The nearly 4,000 Bikinians living today remain scattered throughout the Marshall Islands and the United States, with the largest number still living on Kili.

The Bikinians' story is not unique. The peoples of the other three atolls have similar stories to tell, of being moved off their islands and seeing their homelands contaminated. Indeed, the dispossession of the people of the Marshall Islands and the health consequences of nuclear weapons testing that began in the shadow of World War II and continued through the United States' victory in the Cold War have yet to end – more than six decades later.

The U.S. Government's record 64 years after testing began is sobering:

- The Bikinians remain exiled from their homeland, which is still in need of radioactive cleanup.
- Approximately half the Enewetak population cannot return to their home islands in the northern part of the atoll, where radiation still renders the islands too radioactive.
- At least four islands at Bikini and five at Enewetak were completely or partially vaporized during the testing program.
- Although they were over 100 miles from Bikini, the people of Rongelap received a radiation dose from Bravo equal to that received by Japanese people less than two miles from ground zero at Hiroshima and Nagasaki. They suffered from radiation poisoning; all but two of the nineteen children who were under ten at the time of Bravo developed abnormal thyroid nodules, and there has been one leukemia death.⁸ The people were moved off the islands for three years after the Bravo shot, and they moved off again in 1985 amid concerns about radiation dangers. Resettlement activities are currently underway, but questions about radiation safety continue to linger.
- Here is what the head of the Brookhaven National Laboratory/Atomic Energy Commission medical surveillance team for the islanders wrote in his 1957 annual report on the exposed Marshallese: "The habitation of these people on the island will afford the opportunity for most valuable ecological data on human beings . . .

⁷ Los Angeles Times, July 23, 1978, p. 3.

⁸ Edwin J. Martin and Richard H. Rowland, Castle Series (Defense Nuclear Agency Report No. 6035F 1954), pp. 3, 235; Robert A. Conard et al., A Twenty-Year Review of Medical Findings in a Marshallese Population Accidentally Exposed to Radioactive Fallout (Brookhaven National Laboratory 1974), pp. 59-76, 81-86).

The various radioisotopes present on the island can be traced from the soil, through the food chain, and into the human being.”⁹

- This “guinea pig” mentality is also reflected in the following statement by AEC official Merrill Eisenbud at a 1956 AEC meeting about returning the people of Utrok to their atoll: “Now, data of this type has never been available. While it is true that these people do not live, I would say, the way Westerners do, civilized people, it is nevertheless also true that these people are more like us than the mice. So that [returning the people to Utrok] is something which will [be] done this winter.”¹⁰

III. U.S. Claims Court Litigation and the Compact of Free Association

Based on the damages inflicted upon them by the U.S. nuclear testing program, the peoples of the four atolls brought lawsuits in the 1980’s against the U.S. Government in the U.S. Claims Court seeking compensation under the Fifth Amendment for the taking of their land. The Claims Court denied the U.S. Government’s motion to dismiss the Bikinians’ case, held that their claims were timely, and moved the case through discovery.¹¹ Cases filed on behalf of the other atolls were similarly advanced by the Claims Court after rejection of the U.S. Government’s initial motions to dismiss.¹²

While these cases were working their way through the courts, the U.S. and Marshall Islands governments entered into a Compact of Free Association, in Section 177(a) of which the United States “accept[ed] the responsibility for compensation owing to citizens of the Marshall Islands . . . for loss or damage to property and person . . . resulting from the nuclear testing program.” Section 177(b) called for a separate agreement to ensure “the just and adequate settlement of all such claims.” Pursuant to this so-called “Section 177 Agreement,” the two governments created a Nuclear Claims Tribunal “to render final determination upon all claims past, present and future” of the Marshallese “related to the nuclear testing program.”¹³ The Section 177 Agreement also established a \$150 million trust fund, with income of \$45.75 million earmarked to the Tribunal for the payment of

⁹ Robert Conard, “March 1957 Medical Survey of Rongelap and Utrik People Three Years After Exposure to Radioactive Fallout” (Brookhaven National Laboratory, June 1958) (“Concluding Remarks”) at p. 22. (See http://www.hss.energy.gov/healthsafety/ihs/marshall/collection/data/ihp1a/4569_.pdf.)

¹⁰ Minutes of the AEC Advisory Committee on Biology and Medicine (January 13 and 14, 1956), p. 232. (See http://www.hss.energy.gov/healthsafety/ihs/marshall/collection/data/ihp1c/0495_.a.pdf.)

See also “Radiation Exposure from Pacific Nuclear Tests,” Oversight Hearing before the House Natural Resources Subcommittee on Oversight and Investigations, February 24, 1994 103rd Cong., 2nd Sess.) at p. 61.

¹¹ *Juda v. United States*, 6 Cl. Ct. 441, 450-451, 458 (1984).

¹² See e.g., *Nitot et al v. United States*, 7 Cl. Ct. 405 (1985).

¹³ 48 U.S.C. § 1921b(e)(2).

compensation awards.¹⁴ In conjunction with the establishment of this “alternative tribunal to provide just compensation,”¹⁵ the Section 177 Agreement called for the termination of the federal court lawsuits brought by the Marshall Islanders.

The Court of Federal Claims subsequently dismissed the pending Marshall Islands lawsuits on the grounds that the claimants had to first exhaust the Nuclear Claims Tribunal’s proceedings.¹⁶

The court explained, however, that the Section 177 Agreement’s termination of claims “applies to termination of proceedings, and not to extinguishment of the basic claims involved,” noting that Congress had acknowledged its “obligation to compensate” and had simply “establishe[d] an alternative tribunal to provide such compensation.” The Bikinians argued that the Nuclear Claims Tribunal was inadequately funded by the United States and therefore would not protect their rights, but the court ruled that “[t]his alternative procedure for compensation cannot be challenged judicially until it has run its course.”¹⁷

In a related appeal by the people of Enewetak, Rongelap, Utrok, and other northern atolls of the Marshall Islands, the Federal Circuit agreed that judicial intervention was not appropriate “at this time” based on the “mere speculation that the alternative remedy may prove to be inadequate,” and concluded that it need not address the adequacy of the Tribunal process “in advance of [its] exhaustion.”¹⁸ The court added that the U.S. Government had committed “an initial sum” to resolve claims, “with additional financial obligations over fifteen years for the settlement of all claims,” and that Congress had demonstrated its “concern that its alternative provision for compensation be adequate.”¹⁹

¹⁴ The \$150 million “Nuclear Claims Fund” established under the Section 177 Agreement was, in the words of the Agreement’s Preamble, designed to “maintain, in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program. . . .” The fund was required to distribute \$18 million annually for the first 15 years to make distributions required by the Agreement, including about \$3 million annually to the Nuclear Claims Tribunal. This represents an average investment return for 15 years of 12.5% annually (12.5% x \$150 = 18). That rate of return, of course, could not be sustained over time, and the Fund had to eat into its corpus starting in the first year in order to meet the \$18 million distributions. The Fund, not surprisingly, no longer exists. However, the expectation at the time the Agreement was signed was that the Nuclear Claims Tribunal would make awards in excess of \$45.75, because Article II, Section 7 (c) of the Agreement provides that, “[c]ommencing on the fifteenth anniversary of the effective date of this Agreement, not less than 75 percent of Annual Proceeds shall be available for disbursement in whole or partial payment of monetary awards made by the Claims Tribunal.”

¹⁵ *People of Enewetak v. United States*, 864 F.2d 134, 136 (1988), *cert. denied*, 491 U.S. 909 (1989),

¹⁶ *Juda v. United States*, 13 Cl.Ct. 667 (1987); *Nitol et al. v. United States*, 13 Cl. Ct. 690 (1987).

¹⁷ *Id.* at 686, 688, 689.

¹⁸ *People of Enewetak*, 864 F.2d at 136, 137 (1988), *cert. denied*, 491 U.S. 909 (1989).

¹⁹ *Id.* at 135-36.

IV. The Nuclear Claims Tribunal and Adequacy of Funding

Once again, the Marshallese did what they were told by the United States. Over the next two decades, each of the four atolls brought claims and litigated before the Nuclear Claims Tribunal, each received awards, and, just as each had predicted to the U.S. courts, the inadequately funded Tribunal could not pay the awards.

For example, the Tribunal determined that the Bikinians were entitled to \$563,315,500 in compensation, after offsetting for payments previously made by the United States. However, due to inadequate funding, the Tribunal was able to pay the Bikinians only \$2,279,000, or less than one-half of 1% of their award. As the Tribunal explained, “the Nuclear Claims Fund is insufficient to make more than a token payment.”

The other atolls faced similar dilemmas. Enewetak was awarded \$385,894,500, but only received \$1,647,482, and no payments have been made on the awards to Utrok (\$307,356,398) or Rongelap (\$1,031,468,700).

What did the U.S. Government tell the courts about the Nuclear Claims Tribunal’s funding scheme over the years? It is interesting to contrast the government’s position over the years. The United States in 1988 characterized the Compact scheme to the court as an open-ended commitment as it sought to assure the Federal Circuit that the Tribunal would provide just compensation for all possible claims. It represented to the Court that “the Compact and Section 177 Agreement provide a permanent alternative remedy, with substantial and regenerating funding, for compensating all claims, as necessary, in perpetuity.” Its brief is replete with reassurances that the Section 177 compensation scheme would be permanent, substantial, continuous, and comprehensive.²⁰ “There is no basis to presume that the [Section 177] Agreement . . . will fail to provide a just and adequate remedy,”²¹ it argued, assuring the court that the Agreement provides “continuous funding” and a “comprehensive, long-term compensation plan.” It added that there is a “continuing moral and humanitarian obligation on the part of the United States to compensate any victims—past, present or future—of the nuclear testing program.” Lastly, it argued that the Marshall Islanders’ “constitutional challenge proceeds from the presumption that an international Compact, to which two governments have committed themselves and their resources, will not provide the just remedy it promises. That

²⁰ Brief of the United States at 14, *People of Bikini, Enewetak, Rongelap, Utrik and other Marshall Island Atolls v. United States*, Nos. 88-1206-1207-1208 (Fed. Cir., June 24, 1988). See also *id.* at 33: “a complex, permanent mechanism for compensating claimants”; “a comprehensive, permanent means of resolving... nuclear claims”; 34: an “Agreement to provide *continuous* funding to resolve, not avoid, [the] consequences [of the Nuclear Testing Program]” (emphasis in original); “create and maintain, *in perpetuity*, a means to address...”; “resultant claims” from the nuclear testing program (emphasis in original); 37: “reasonable” and “well funded”; 38: “permanent funding mechanism”; “comprehensive, long-term compensation plan”; 45: “structured to operate permanently” to “provide continuous funding”; “structured and financed to operate ‘in perpetuity’”; “no basis to presume that the Agreement... will fail to provide a just and adequate settlement.”

²¹ *Id.* at 45.

presumption is wholly incorrect.”²² And in case there was any doubt, it pointed to the actual text of the preamble to the Section 177 Agreement, which promises to “provide, in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program.”

If the funding actually did prove to be inadequate, the government told the court that Congress could step in: “It is, of course, conceivable that the Fund could become depleted because of radical long-term investment difficulties, or substantial unforeseen damages,” and it went on to quote Article IX, the changed circumstances provision, as one example of how additional funding would be available, assuring the court that “[i]n ratifying the [Section 177] Agreement, Congress also recognized that should changed circumstances arise which would prevent the program from functioning as planned, Congress would need to consider possible additional funding.”²³

The U.S. Government also stressed that the \$150 million trust fund established under the Section 177 Agreement was a “base investment” and that additional funding could become available through other means:

In the Section 177 Agreement... the United States has responded to the complex consequences of the nuclear testing program by negotiating a diverse compensation plan providing... a mechanism for direct adjudication of *all* claims. This plan has been structured to operate permanently, and, at a base investment of \$150 million, to generate sufficient proceeds to address all identified needs. In ratifying the Agreement, Congress also recognized that should changed circumstances arise which would prevent the program from functioning as planned, Congress would need to consider possible additional funding.²⁴

This is why in 1988 the Federal Circuit Court, assured by the U.S. Government that it would honor its constitutional obligation to pay just compensation if the entire \$150 million trust fund under Section 177 proved insufficient, called that \$150 million an “initial sum” and an “initial amount.”²⁵

In 2000, the Marshall Islands Government presented Congress with a petition under the “Changed Circumstances” article of the Section 177 Agreement requesting additional funds to cover unpaid Tribunal property claims. Congress asked the State Department to make a recommendation on this petition. That department thought about the issue for five years before recommending that Congress not act. And when the Marshall Islands

²² *Id.* at 35.

²³ *Id.* at 34-35.

²⁴ *Id.* at 44-45.

²⁵ *People of Enewetak v. United States*, 864 F.2d 134, 135-36 (Fed. Cir. 1988) (emphasis added).

Government sought to engage the State Department on this issue, State refused, using as an excuse that “this issue is on a separate track . . . before Congress via the [Marshall Islands Government’s] request submitted under the changed circumstances provision.” That outdid Joseph Heller’s “Catch-22.”

Fast forward now to 2008, with the Nuclear Claims Tribunal “perpetual” fund out of money and able to pay only 2/10 of 1% of its awards.²⁶ Did the U.S. Government argue to the court that there would be adequate funding to pay all claims? No. In a rather terse statement, it argued instead that there is no constitutional issue because the Section 177 Agreement offers “monetary compensation” greater than “zero.”²⁷

V. Are the Nuclear Claims Tribunal Awards Excessive?

No. The Tribunal Awards were made through an independent judicial process and are extremely conservative and reasonable. The Section 177 Agreement, to which the U.S. Government was a party, established the Nuclear Claims Tribunal as the body responsible for determining how much compensation should be paid and to whom. After the Tribunal issued its decisions in the Bikini and Enewetak cases, some officials in Congress and the administration suggested that the “home field” advantage of the Tribunal resulted in skewed and inflated awards and somehow invalidated the Tribunal’s judicial process. In response, the Marshall Islands Government retained former Attorney General Dick Thornburgh to perform an independent assessment of the Tribunal’s procedures and decisions.

On May 20, 2005, Attorney General Thornburgh issued his report to the House Resources Committee. “Simply stated,” he wrote, “the report finds that the [Nuclear Claims Tribunal] fulfilled the basic functions for which it was created in a reasonable, fair and orderly manner, and with adequate independence, based on procedures, closely resembling legal systems in the United States, that are entitled to respect.” The Thornburgh report also concluded that the property damage claims litigated before the Tribunal were “characterized by the kind of legal briefing, expert reports, and motion practice that would be found in many U.S. court proceedings” and that the hearing procedures and rules of evidence resembled those used in similar U.S. proceedings.²⁸

The Tribunal’s awards were neither skewed nor inflated. For example, the people of

²⁶ As of May 15, 2010, the Nuclear Claims Fund had a balance of \$71,303.92. The Nuclear Claims Tribunal has a chairman, but there are no other judges, no Defender of the Fund, nor a Public Advocate. May 15-16, 2010 personal correspondence with William Graham, former Public Advocate.

²⁷ Brief of the United States at 25, *People of Bikini v. United States*, No. 2007-5175 (Fed. Cir.) (Apr. 4, 2008).

²⁸ Dick Thornburgh et al., “The Nuclear Claims Tribunal of the Republic of the Marshall Islands: An Independent Examination and Assessment of its Decision-Making Process” (Kirkpatrick & Lockhart, LLP 2003) (“Thornburgh Report”), p. 2.

Bikini presented cleanup options that ranged as high as \$1 billion, but the option selected by the Tribunal cost about \$250 million and is the same cleanup method recommended by the U.S. Department of Energy's Lawrence Livermore National Laboratory.

These cleanup costs are significant, but they must be considered in the context of the cost of the tests themselves:

- The Department of Defense costs for all nuclear tests in the Marshall Islands exceeded \$6 billion.²⁹ Civilian costs are harder to calculate, but in transferring its materials, facilities and properties to the new Atomic Energy Commission in 1946, the Manhattan Project spent \$3.8 billion to manufacture nine new atomic bombs and continue research.³⁰ The AEC spent over \$4.3 billion from July 1, 1946 through June 30, 1947,³¹ and from 1948-1958, the AEC spent nearly \$130 billion on production research, development, and testing of nuclear weapons.³²
- The United States never questioned the cost or value of the nuclear tests at Bikini and Enewetak because they assured U.S. nuclear superiority over the Soviet Union and led to immediate savings of billions of dollars in the Defense Department budget in the late 1940's and 1950's. As the AEC told Congress in 1953: "Each of the tests involved a major expenditure of money, manpower, scientific effort and time. Nevertheless, in accelerating the rate of weapons development, they saved far more than their cost."³³
- The costs to clean up the radioactive, chemical and other hazardous waste at just 21 U.S. nuclear weapons production sites in 13 states dwarfs the numbers for the Marshall Islands. The Department of Energy estimates these costs at \$205-\$260 billion.³⁴ Congress appropriated an average of \$5.75 billion annually for the program in the late 1990's, and it is anticipated that this funding level will continue at this rate indefinitely.³⁵

²⁹ Stephen I. Schwartz, ed., Atomic Audit: The Costs and Consequences of U.S. Nuclear Weapons Since 1940 (Brookings Institution Press 1998), pp. 101-03. The dollar figures in this book, expressed in 1996 dollars, have been updated through 2010 using a Consumer Price Index inflation calculator. See http://www.bls.gov/data/inflation_calculator.htm.

³⁰ Id. at 61-62.

³¹ Id. at 63.

³² Id. at 65-75.

³³ U.S. Atomic Energy Commission, Thirteenth Semiannual Report of the Atomic Energy Commission (1953), p. 18.

³⁴ See <http://www.em.doe.gov/Pages/projects.aspx>. See also Closure Planning Guidance (U.S. Department of Energy, Office of Environmental Management) (June 1, 2004) at p. 14; http://www.em.doe.gov/vgn/images/portal/cit_1819/26/34/94385Vol1_Final_Printed_Version_Word4.pdf.

³⁵ Accelerating Cleanup: Paths to Closure (U.S. Department of Energy, Office of Environmental Management) (June 1998) at pp. 2, 5-8. See also Environmental Management: Program Budget Totals (FY 1998 - FY 2000) and Environmental Management's FY 2000 Congressional Budget Request.

- The U.S. Government has now spent more than \$49 billion at the Hanford, Washington nuclear weapons site without removing one shovelful of contaminated soil.³⁶ That is what the Department of Energy has spent on studying radiation problems at an area exposed to a miniscule percentage of the radiation that was unleashed in the Marshall Islands.
- Under the Radiation Exposure Compensation Act of 1990,³⁷ the U.S. Government has already approved compensation claims of approximately \$1.5 billion to claimants who were on-site at Nevada nuclear tests, those downwind from the testing, uranium mill workers, uranium ore transporters, and others working in radioactive mines.³⁸ The magnitude of the nuclear tests in Nevada was approximately 1% of the Marshall Islands tests.³⁹ In addition, under the Energy Employee's Occupational Illness Compensation Program Act,⁴⁰ the U.S. Government has paid an additional \$5.75 billion to eligible Department of Energy nuclear weapons employees, contractors and subcontractors.⁴¹

VI. Congressional Reference Case

Where are we today and what can or should Congress do? Last month, on April 5, 2010 the U.S. Supreme Court denied review of the appeal filed by the people of Bikini and Enewetak seeking to obtain compensation for the Nuclear Claims Tribunal awards. That decision settles 30 years of litigation, not only for Bikini and Enewetak, but for Rongelap and Utrik as well. Nevertheless, it is interesting to review some of these decisions over the years to see how the courts emphasized the themes of equitable relief, congressional intervention, if necessary, and the view that the Section 177 Agreement is a perpetual fund that began with an "initial" appropriation:

³⁶ See <http://www.em.doe.gov/pdfs/EMProjectsLCC.pdf>.

³⁷ 42 U.S.C. § 2210 (2006) (1990), P.L. 101-426. This statute provides monetary compensation for people who contracted cancer and a number of other specified diseases as a direct result of their exposure to atmospheric nuclear testing undertaken by the United States during the Cold War, or their exposure to high levels of radon while working in uranium mines.

³⁸ See http://www.usdoj.gov/civil/omp/omi/Tre_SysClaimsToDateSum.pdf. Moreover, last month bills were introduced in the Senate (S. 3224) and House (H.R. 5119) that would expand qualifications for compensation, raise levels of compensation, and expand the downwind exposure area.

³⁹ Thornburgh Report, *supra* n. 25 at p. 3.

⁴⁰ 42 U.S.C. §§ 7384 et seq. (2006). This program pays workers who were approved for compensation under Section 5 of the Radiation Exposure Compensation Act, or their eligible survivors, an additional \$50,000 and future medical benefits related to the condition for which they were approved for compensation under the Radiation Exposure Compensation Act.

⁴¹ See <http://www.dol.gov/owcp/energy/regs/compliance/weeklystats.html>.

- Following adoption of the Compact, the Court of Federal Claims dismissed the Bikinians' lawsuit on the ground that they first had to exhaust the Tribunal's proceedings. However, the court explained that the Section 177 Agreement's "termination" of claims "applies to termination of proceedings, and not to extinguishment of the basic claims involved," noting that Congress had acknowledged its "obligation to compensate" and had simply "establishe[d] an alternative tribunal to provide such compensation." The court explained, "As long as the obligations are recognized, Congress may direct fulfillment without the interposition of either a court or an administrative tribunal."⁴²
- In affirming that decision, the Federal Circuit Court of Appeals did so on the understanding that the Compact Section 177 Agreement provided "in perpetuity, a means to address past, present and future consequences" of the U.S. nuclear testing program.⁴³ That premise has turned out to be false.
- The same court viewed the \$150 million fund provided under the Section 177 Agreement as an "initial sum" and an "initial amount," with "additional financial obligations over fifteen years for the settlement of all claims," and that Congress had demonstrated its "concern that its alternative provision for compensation be adequate."⁴⁴
- The Nuclear Claims Tribunal was established as an "alternative tribunal to provide just compensation,"⁴⁵ not 2/10 of 1% of just compensation, as has been paid to date.
- In dismissing the Bikini and Enewetak lawsuits in 2007, Judge Miller of the U.S. Court of Federal Claims concluded by noting that the matter of just compensation was properly in the hands of the U.S. Congress through consideration of the "Changed Circumstances" petition that had been submitted to Congress pursuant to Article IX of the Section 177 Agreement or pursuant to "such action as it deems appropriate."⁴⁶
- In affirming Judge Miller's ruling in 2009, the Federal Circuit Court of Appeals "observe[d] that its sense of justice, of course, makes it difficult to turn away from a case of constitutional dimension. . . ."⁴⁷ It went on to conclude that U.S. courts

⁴² *Juda v. United States*, 13 Cl.Ct. 667, 688, 689 (1987).

⁴³ *People of Enewetak v. United States*, 864 F.2d 134 136 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 909 (1989).

⁴⁴ *Id.* at 135-36 (emphasis added).

⁴⁵ *Id.* at 136.

⁴⁶ *People of Bikini v. United States*, 77 Fed. Cl. 744, 768 (Cl.Ct. 2007).

⁴⁷ *People of Bikini v. United States*, No. 2007-5175 (Fed. Cir.), 554 F.3d 996, 1001 (Fed. Cir. 2009).

had no power to hear the Bikini and Enewetak claims because Congress, in the Section 177 Agreement, withdrew the jurisdiction of U.S. courts to hear such claims: "This court cannot hear let alone remedy, a wrong that is not within its power to adjudicate. The sweeping language of the Section 177 Agreement withdraws jurisdiction of the U.S. courts."⁴⁸

- Ultimately, the Federal Circuit Court of Appeals acknowledged that the remedy for the claims essentially lies with Congress: "The settlement agreement entrusted the funding remedy to a procedure outside the reach of judicial remedy."⁴⁹

With the Supreme Court's recent decision refusing to hear the Bikini and Enewetak appeals, relief before the U.S. courts through the normal litigation process is now closed, not only for Bikini and Enewetak, but also for Rongelap and Utrik, as pursuing their claims in the U.S. courts would be fruitless.

This Committee cannot initiate appropriations, but it can take the lead in getting the United States to honor its constitutional, statutory and moral obligations to the people it damaged and the others who, with no real options, gave up their lands to help the United States win the Cold War. The peoples of all four atolls urge this Committee to take that lead by referring their cases to the Court of Federal Claims under Congress' congressional reference authority set forth in statute⁵⁰ and by court regulations.⁵¹

Our understanding of the procedure, which other witnesses will discuss today, is that, if directed by Congress, the Court of Federal Claims will produce an advisory report to Congress that is prepared in much the same manner that a court case is tried and decided, in which the court makes findings and conclusions sufficient to inform Congress whether the demand is a legal or equitable claim or a gratuity and also determines the amount (if any) that is legally or equitably due from the United States to the claimants.⁵²

The people of the four atolls stand ready to assist you in any way possible in moving such legislation forward.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1000.

⁵⁰ See 28 U.S.C. §§ 1492, 2509.

⁵¹ Rules of the United States Court of Federal Claims, Appendix D, Procedure in Congressional Reference Cases, p. 6.

⁵² 28 U.S.C. § 2509(c). See also *Burkhardt v. United States*, 113 Ct. Cl. 658 (1949) ("We are therefore of the opinion that the term 'equitable claim,' as used in 28 U.S.C. § 2509, is not used in a strict technical sense meaning a claim involving consideration of principles of right and justice as administered by courts of equity, but the broader moral sense based upon general equitable considerations.")

VII. U.S. Department of Agriculture Food Program

The last issue we wish to bring to your attention is the U.S. Department of Agriculture food program for the peoples of the four atolls. This program was initiated many years ago due to the displacement of the islanders, the taking and destruction of some of their islands, and ongoing concerns about radiation safety of the islands to which they returned. The program was codified in Section 103(h)(2)(B) of the Compact of Free Association Act of 1985 (P.L. No. 99-239), which provides that the "President of the United States shall . . . continue . . . the [U.S. Department of Agriculture] food programs of the Bikini and Enewetak people." Section 103(h)(3) goes on to direct that the food program "be provided to such extent or in such amounts as are necessary" and furthermore that: "It is the sense of Congress that . . . consideration will be given to such additional funding for these programs as may be necessary."

The Section 103 U.S. Department of Agriculture food program was later expanded to include Rongelap and Utrok, and in 2003 Congress revisited this issue in Section 103(f)(2)(B) of the Compact of Free Association Amendments Act of 2003 (P.L. No. 108-188), which directs the President of the United States to "ensure the assistance provided under these programs reflects the changes in the population since the inception of such programs."

The simple fact is that the populations of the four atolls have increased significantly over the years without any corresponding increase in the U.S. Department of Agriculture food program allotment. This issue does not require any new legislation. It simply requires congressional oversight to ensure that the U.S. Department of Agriculture carries out its job and increases its allotment of the Department's food program to the peoples of the four atolls to adequately reflect the increases in their population. The combination of the radiation problems at the four atolls and in their soils and the recent financial downturn in the value of trust funds established for their well-being has turned the basic task of just feeding the people into a huge concern. The four atolls have raised this issue informally with both Region IX of the U.S. Department of Agriculture and with the U.S. Department of the Interior, but your oversight in making sure this happens would be greatly appreciated.

* * * * *

Mr. Chairman, the American people have a legal and moral obligation to compensate the people of the Marshall Islands who gave so much of their health and property in the defense of the United States. To those who say the book is closed on this part of American history because of the Compact of Free Association, we say no, because one chapter is missing. That book cannot be closed until the islanders' lands are restored and they have received full compensation for their claims against the United States. This country cannot and should not play a shell game with the constitutional rights of the Marshall Islanders.

We appreciate the opportunity to appear before you today, and I or the Marshallese leaders of the four atolls would be pleased to answer any questions you may have. Thank you.

